



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Tom DeBerry, Member
State Board of Control
Austin, Texas

Dear Senator DeBerry:

Opinion No. 0-3708

Re: Procedure for the State Board
of Control where contractors
for State supplies make de-
fault in deliveries.

Your letter of recent date, touching the matter
above stated, is as follows:

"Under your Opinion No. 0-2922, dated July 17, 1941,
you have outlined a procedure for the Board of Con-
trol to follow in cases where contractors on term
contracts have failed to fill orders in a reasonable
length of time. It is reasonable to suppose that the
same procedure should be followed in the case of spot
orders or daily purchases.

"To follow this procedure in every case where a con-
tractor fails to make delivery in a reasonable length
of time involves the State in a procedure which ulti-
mately costs the State much more than the amount sought
to be recovered. To illustrate:

- "1. Many times the total amount of money involved
in the contract order or spot purchase order
is so small that to follow the procedure out-
lined in your opinion would cost much more
than the total amount involved.
- "2. In many instances where new bids are taken,
no bids can be secured on the supplies in
question.
- "3. In many instances where new bids are taken
and the difference, if any, charged to the
original contractor, the procedure outlined
in the preparation of the file for submission

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to you and your disposition thereof, would involve an expenditure such in excess of the amount in question in regard to the difference of the bid.

"Of course, where new bids are taken and the difference, if any, charged to the original contractor who pays same, we will consider the file closed."

Before undertaking to answer your questions, we will quote the final paragraph from our Opinion No. 9-2922, to which you refer:

"So that, you are respectfully advised that your Board should acknowledge receipt of the Pittsburgh Plate Glass Company's letter, saying to the Company that in the event the Company fails or refuses for any cause to deliver the merchandise upon any proper order under the contract, within a reasonable length of time, then the State Board of Control will purchase such merchandise on the open market, at the best possible price, and charge the Pittsburgh Plate Glass Company with the difference, if any, in price, over and above the contract figures, as provided in the proposal upon which the contract was entered into; and, further, that whether or not the Company has been absolved from such liability by any act of the Government will be referred to the Attorney General of the State for his determination as the basis for an action upon the contract."

This, we believe, is the only procedure suggested by us in that opinion.

Answering, we beg to advise:

1. Where the total amount of money involved in the contract order or spot-purchase order is so small that to follow the procedure suggested by us would cost many times more than the amount involved, as you state in question No. 1, common business prudence and sound official discretion would warrant that no further action whatever should be taken by you. It would appear, however, that the procedure mentioned by us

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in our former opinion could be taken, and should be taken in every case of default, to the extent of making reply to the defaulting contractor (whether term contract or spot contract) and the purchasing by the Board of the supplies ordered, where the same may be purchased on the market. Moreover, if such supplies are actually purchased by the Board, then you should further notify the contractor of the excess cost of such supplies, if any, and that the contractor would be charged with such excess. Such procedure would appear to be at a nominal cost only, and should with propriety be followed in all cases of default.

2. In those cases where new bids are called for, and no bids can be secured for the supplies needed, the matter obviously is at an end. If in such case no bids can be had, then no purchase can be made, and there could be no possible basis for any super-added liability in any event.

In this connection, all facts and circumstances known to your Board may be taken into consideration in reaching your conclusion to ask for new bids on such supplies. This is a matter of sound business judgment and just official discretion with you, since such a procedure might involve costs with no reasonable prospect of obtaining the supplies.

3. Your question 3 is not so easily answered, but the answer is yet controlled by the principles of sound business judgment and just official discretion above mentioned.

In all instances where new bids are taken and the excess difference, if any, has been charged to the original contractor, there arises a liability on the part of the contractor upon his term contract or his spot-purchase contract for such difference, and no officer or board of the Government may release such liability.

If, in such a case, however, the amount of such difference in cost of supplies by way of super-added liability to the contractor's liability is so small as that indisputably the cost necessary to a preparation and submission of the matter to the Attorney General for action would exceed the amount involved, then, it is the opinion of this Department your Board should not incur such cost, and should not submit the matter to the Attorney General for action at all. In this connection, we would add that where there have been repeated defaults by a contractor, and the aggregate of such super-added liability would exceed the cost of preparing and submitting to the Attorney General a statement of

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such matters, then such statement should be made for the information and guidance of this Department.

You say in the last sentence of your letter:

"Of course, where new bids are taken and the difference, if any, charged to the original contractor who paid the same, we will consider the file closed."

This course would be proper where the file pertains only to the particular order or orders involved, whether upon spot contract or upon term contract.

We trust that what we have said sufficiently answers your inquiries.

Very truly yours

ATTORNEY GENERAL OF TEXAS

APPROVED JUN 23 1942

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By

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